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Supreme Court, U.S.
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No. 03-1488

In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

REPLY TO BRIEF IN OPPOSITION

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I. THE OPPOSITION REINFORCES THE NEED FOR CERTIORARI BY DEMONSTRATING A SIGNIFICANT SPLIT IN AUTHORITY AS TO WHETHER A COURT MAY PERMANENTLY ENJOIN SPEECH AS A REMEDY IN A DEFAMATION CASE

The Opposition does not, and cannot, deny that there is a significant split in decisions among the Circuits and the States as to whether a court may impose a broad injunction of speech as a remedy in a defamation case. Nothing in the Opposition refutes that many, and likely most, courts across the country would disagree with the California Court of Appeal's decision upholding a permanent injunction preventing Petitioner Tory from saying *anything* about Respondent Johnnie Cochran in any public forum at any time. Indeed, the Opposition's central contention, that an injunction of speech following a trial is not a prior restraint, only highlights the need for this Court to grant the Petition for Writ of Certiorari and clarify this important issue.

A. The Opposition Actually Reaffirms That There Is A Split Among The Circuits And State Supreme Courts As To Whether A Court Can Issue An Injunction In A Defamation Action

Although the Opposition asserts that there is no split in authority, its analysis of pertinent case law actually reinforces the existence of a split between jurisdictions that allow injunctions in defamation cases and those that

do not. (O5-11)[1] The Opposition does not dispute that there is a general rule, adhered to in most jurisdictions, holding that "equity will not enjoin a libel." Rodney A. Smolla, *Law of Defamation*, § 9.85 (2003). The Opposition also makes no meaningful effort to distinguish or address the many decisions cited in the Petition that disapprove injunctions on speech, even after a judicial determination has been made that the speech is defamatory. (P10-12)

Instead, the Opposition attempts to dismiss some of the cases that contradict the general rule barring such injunctions by explaining that they were "wrongly decided, or decided without adequate explanation of the court's rationale[.]" (O5 n.5) But this, of course, acknowledges that there is a significant split in authority among courts across the country. The fact that Respondent Cochran disagrees with the decisions that contradict the conclusion of the California Court of Appeal in his favor does not refute the unquestionable existence of a significant split in authority. (P7-13)

B. The Opposition Demonstrates How The Misapplication Of *Pittsburgh Press* Is Fomenting The Split

In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), this Court approved a narrow injunction restraining gender discriminatory commercial advertisements. Although the decision in *Pittsburgh Press* generally acknowledged that "it has

[1] Citations to the Petition for Writ of Certiorari will be styled, "P___", citations to Respondent's Brief in Opposition will be styled, "O___", and citations to the appendices will be styled, "A___".

never been held that all injunctions [on speech] are impermissible," that opinion did not involve or evaluate any defamation claims, nor did it approve of injunctions on supposedly defamatory speech. *Id.* at 390.[2] In fact, the first part of the sentence from *Pittsburgh Press* relied upon by Respondent expressly invokes and *distinguishes* the decision in *Near v. Minnesota*, 283 U.S. 697 (1931), where this Court held that an injunction on future speech, even if preceded by the publication of defamatory material, was an unconstitutional prior restraint. *Near*, 283 U.S. at 706, 721. The Opposition explains that several opinions have seized on the general language in *Pittsburgh Press* in order to justify injunctions in defamation cases. (O6-11)[3]

The Petition acknowledges that narrow injunctions on speech may be permissible in certain contexts (*e.g.*, national security, obscenity or advertising illegal activity). (P9, P16-17) However, as *Pittsburgh Press* suggests, and many courts across this nation have recognized, defamation is a different breed. (*See* P9-12) Defamation has elements that may change over time (*e.g.*, scienter and falsity), making efforts to enjoin supposedly defamatory speech particularly difficult and pernicious. (*See* P16-17) Indeed, reading *Pittsburgh Press* to allow injunctions in

[2] *See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573-74 (1995) (acknowledging that because *Pittsburgh Press* was a case about commercial advertising, not defamation, it permitted more government control under the First Amendment).

[3] *See, e.g., Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206, 1209 (6th Cir. 1990); *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975).

defamation cases, as several lower courts have done, conflicts with this Court's decisions in *Near* and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (hereinafter "*Keefe*"). Contrary to the Opposition's contentions, the injunctions in *Near* and *Keefe* were permanent, they were issued after adversarial proceedings, they were meant to stop supposedly harmful future speech and they were deemed by this Court to be unconstitutional prior restraints. *Near*, 283 U.S. at 705-06; *Keefe*, 402 U.S. at 417-19. The Opposition's assertion that a permanent injunction is not a prior restraint directly conflicts with this Court's statement in *Alexander v. United States*, 509 U.S. 544, 550 (1993), describing the permanent injunctions in *Near* and *Keefe* as "classic examples of prior restraints." The decisions interpreting *Pittsburgh Press* to allow injunctions in defamation cases misapply *Pittsburgh Press*, and exacerbate the constitutional split that plagues this issue. Review by this Court is essential to clarify the law in this area and resolve a significant split among courts across the country.

C. Respondent's Public Figure Status Heightens The Need To Resolve The Split As It Impacts This Case

The constitutional dilemma posed by the split is amplified by an undisputed fact that the Opposition refuses to acknowledge: Respondent is an admitted public figure. (A10, A21) As the Petition explains, public figures like Respondent Johnnie Cochran enjoy less protection under the law of defamation. (P13) In this case, therefore, it is even more important to resolve whether a court may forever enjoin discussion of a public figure.

D. The Opposition's Contention That The Injunction Does Not Need To Be Limited To The Words Found To Be Defamatory Reinforces The Need To Decide When A Court Order Preventing Speech Is Impermissibly Overbroad

The Opposition relies on cases that allow injunctions in the defamation context, but those opinions also carefully explain that any such injunction must be limited to the statements already found to be defamatory. (P14-15)[4] Despite this limiting language, the Opposition admits that the injunction is "broad," and further contends that, in this case, "[e]njoining only specific statements or only defamatory speech will not" be a sufficient remedy. (O12) The Opposition's contention, however, stands contrary to abundant constitutional authority – including the cases relied on throughout the Opposition – demonstrating that the injunction here is, on its face, unconstitutionally overbroad. The injunction upheld by the California Court of Appeal prohibits *all* future speech about Cochran, and is not limited to specific statements previously held to be defamatory or even "defamatory" speech in general. (P13-16) The Opposition's recognition that the injunction is broad, coupled with the constitutional mandate that any injunction "in the area of First Amendment rights must be couched in narrowest terms," *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968),

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[4] *See, e.g., Lothschuetz, supra*, 898 F.2d at 1209 (injunction limited to "the statements which have been found in this and prior proceedings to be false and libelous"); *Advanced Training Systems, supra*, 352 N.W.2d at 11 (injunction "limited to the precise statements found libelous"); *Retail Credit, supra*, 218 S.E.2d at 62-63 (injunction limited to "repetition of the exact allegations found to have been libelous").

reinforces the need for this Court to decide the permissible scope of injunctions in the defamation context, *even assuming* this Court resolves the split to allow such injunctions.

II. THE OPPOSITION'S EFFORTS TO RECAST THIS CASE DO NOT DIMINISH THE NEED FOR CERTIORARI

A. The Overbroad Injunction Is Not Limited To A Particular "Place"

For the first time in any briefing in this case, Cochran suggests that the injunction is valid because it is merely a restriction on the "place" of Petitioners' speech. (O3, O12) The injunction broadly prohibits all discussion of Cochran in "any public forum." (A13) Public forums include "places," such as streets, parks and sidewalks,[5] but they also encompass much more than mere physical locations. Indeed, the Opposition relies on *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475-76 (2000), which determined that a community board meeting and a community newsletter were each a public forum. Thus, the injunction's reach to "any public forum" speaks directly to its unconstitutional overbreadth by preventing speech about Cochran in public places, public meetings, news outlets, and all other forums open for public discussion. Under the terms of the injunction, Tory could not walk down a public sidewalk and talk to a friend about Johnnie Cochran.

[5] O3 (acknowledging that streets, sidewalks and parks are public forums); *see also Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (parks and streets are public forums).

B. The Purportedly Extortionate Purpose Of Petitioners' Prior Speech Has No Bearing On The Petition

The Petition does not rely on any disputed factual findings, and does not ask the Court to review or resolve any conflicts in the facts. Instead, the Petition presents a question for review that challenges the face of a permanent injunction limiting future speech, relying only on the undisputed fact that Cochran, an admitted public figure plaintiff, obtained a permanent injunction following a bench trial on his defamation and related false light claims. (A2-6, A10, A21)[6]

Petitioners take issue with the Opposition's repeated accusations of extortion. (O1-2, O11-13)[7] But Cochran's

[6] In California, defamation claims and false light claims based on the same facts are "in substance equivalent." *Kapellas v. Kofman*, 1 Cal.3d 20, 35 n.16 (1969).

[7] Cochran never filed a criminal complaint for extortion, nor did he bring a civil suit on that theory. Neither Petitioner was ever charged, tried or convicted of extortion. The trial court did not make a finding of "extortion." Even if Cochran's baseless claims of extortion could be charitably construed as a mere rhetorical device, they still are not warranted. Courts consistently hold that the right to free speech is not diminished simply because the subject of the speech feels itself being pressured, coerced or even extorted. *See Keefe, supra,* 402 U.S. at 418-19 (the claim that expressions are "intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment," as "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("'coercive'" speech is "protected by the First Amendment"); *Willing v. Mazzocone*, 393 A.2d 1155, 1156-58 (Pa. 1978) (striking down permanent injunction on woman's false and defamatory speech about her former lawyers even though woman was trying to exact money from her lawyers that she was not owed); *Gilbert v. National Enquirer, Inc.*, 43 Cal.App.4th 1135, 1142-44 (1996) (rejecting injunctive relief even

(Continued on following page)

characterization of the nature or purpose of Petitioners' alleged prior speech does not diminish the need for certiorari. Indeed, regardless of the purported content or purpose of any past or future speech, the face of the injunction still raises an important constitutional question.

CONCLUSION

The question presented in the Petition allows this Court to address a critical constitutional dilemma on multiple levels. First, this case presents the Court with an opportunity to resolve the split between the jurisdictions that allow injunctions on speech in the defamation context and those that do not. Second, this case presents this Court the opportunity to clarify whether a permanent injunction of speech should be regarded as a prior restraint. Third, if the Court determines that injunctive relief may be available in defamation cases, it can still deny such relief to public figures, who typically enjoy less protection because by virtue of their opportunities for "self-help" and their choice to enter the limelight. Finally, even if the Court approves of injunctions to stop future defamation, it can restrict the scope of such orders to

though plaintiff claimed that defendant was using defamatory speech to "extort" money from her).

prevent overbroad injunctions that limit all future speech on a given topic.

Respectfully submitted,

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